No. 7494.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

United States of America,
Appellant,

vs.

Walter Woodall,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEE.

VOLNEY P. MOONEY, JR.,
SYLVESTER HOFFMANN,
Chester Williams Bldg., 215 W. 5th St., L. A.,
Attorneys for Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

STATUTES.

Text Books and Encyclopedias.

No. 7494.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

United States of America,
Appellant,

vs.

Walter Woodall,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant's "Statement of the Case" is controverted by appellee, said statement being both inaccurate and not sufficiently complete to present either "the questions involved" or "the manner in which they are raised" (Rule 24, C. C. A. 9).

Walter Woodall, the appellee (hereinafter called plaintiff) on November 5, 1930 [R. 9] filed his complaint in the District Court against the United States, the appellant (hereinafter called defendant), upon a contract or policy of war risk insurance.

He alleged that while said contract or policy was in full force, to-wit: in November, 1919, he became, ever since has been and now is totally and permanently disabled by reason of "pulmonary tuberculosis, gall bladder disabilities and other disabilities." [R. 4-8.]

The defendant joined issue [R. 10-11] and the cause was tried before the Honorable Paul J. McCormick, District Judge, on May 31, 1933, sitting without a jury. [R. 14.]

At the close of plaintiff's case, the defendant made a motion for judgment on the ground that plaintiff had failed to establish total and permanent disability from the time the policy was in force, which motion was denied without prejudice; no exception was taken to that ruling. [R. 64.]

The defendant thereupon presented its evidence [R. 65 *et seq.*] and both parties rested. [R. 17.] The case was taken under submission by the trial court the same day, *e. g.*, May 31, 1933. [R. 17.]

On June 30th, 1933, the court made and entered general findings for plaintiff, pursuant to the prayer of his complaint. [R. 18, 79.] On July 7th, 1933, the court signed and filed special findings and conclusions of law in favor of plaintiff [R. 21-26] and judgment for plaintiff was signed, filed and entered on that day. [R. 27-29.] On September 5, 1933 (or 62 days thereafter) defendant filed it's Proposed Findings of Fact and Conclusions of Law [R. 82-84] pursuant to a stipulation [R. 80] and on

that day the trial judge ordered that the same be filed *nunc pro tunc* as of July 7, 1933, and prior to the entry of said judgment; that an exception be noted *nunc pro tunc* as of that date to the ruling of the court refusing to accept defendant's said proposed special findings and it's proposed conclusions, and that defendant's objection to the approval of plaintiff's proposed special findings and conclusions and the entry of judgment and exception noted to the ruling of the court thereon be entered *nunc pro tunc* as of said date. [R. 80.] No objections were made, in fact, nor were any grounds assigned in support of such objections, by defendant, and no other requests for a declaration of law made by defendant during the progress of the trial.

No exceptions were taken to any ruling of the trial court during the progress of the trial.

Thereafter, defendant's petition for appeal [R. 97-98] and assignment of errors [R. 99-103] were duly filed and the appeal allowed. [R. 104.]

QUESTIONS PRESENTED.

(1) Must the judgment of the trial court be affirmed, in view of the state of the record?

(2) Is there any substantial evidence to support the finding that plaintiff was totally and permanently disabled from and after November, 1919?

PERTINENT STATUTES.

In addition to those set forth in the brief of appellant, appellee offers the following additional statutes:

Sec. 700 R. S. (28 U. S. C. A. 875):

> "When an issue of fact in any civil cause in a District Court is tried and determined by the court without the intervention of a jury, according to section 773 of this title (R. S. 649), the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Sec. 649 R. S. (28 U. S. C. A. 773; Comp. St. Secs. 1587-1668):

> "Issues of fact in civil cases in any District Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, agree to waive a jury by a stipulation in writing filed with the clerk or by an oral stipulation made in open court and entered in the record. The findings of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

SUMMARY OF THE EVIDENCE.

There is no controversy relating to the following facts: plaintiff enlisted December 31st, 1917, and was discharged September 11th, 1919; that he applied for and was granted a contract of war risk insurance during the month of January, 1918, in the sum of $5,000.00, and premiums were paid thereon up to and including the month of December, 1919, which, with the grace period of thirty-one days, finally lapsed the contract at midnight January 31, 1920. [R. 31.]

Plaintiff was thirty-three years of age at the time he enlisted in the United States Navy, and prior thereto had lost no time from illness or sickness. He was assigned to the U. S. S. "Roanoke" which was engaged in laying mines in the North Sea. He passed coal from the bunkers to the firemen where the air was dense and no ventilation was provided. The ship used soft coal. He also helped in coaling the ship when it entered port. At one time he worked fourteen hours steadily without relief. The boiler room was extremely hot; he would strip to the waist and then stand under the single ventilator provided where the air was very cold. He got frequent colds and had stomach trouble with pains, would get tired and cough, and appeared to the ship's doctor on numerous occasions for treatment. The place where he slept was poorly ventilated. [R. 36-37.]

At the time he was discharged he still had a tired feeling and coughed; the cold stayed with him all of the time; he had pains in his stomach, his right side was sore and he intermittently was constipated and had diarrhoea and sour belches. [R. 37.]

At the time he was examined at discharge he did not strip. The doctors asked him if he felt alright and he wanted to be discharged so he said he did. [R. 37.]

Immediately after his discharge he went to his home in Alabama and saw Dr. Evans who gave him medicine and treatment. His pains in his stomach, soreness in the right side and tired feeling, pain in the chest and coughing continued. [R. 38.]

Thereafter he went to work firing a stationary boiler with oil in Louisiana for a total term of six weeks; if he felt bad he would lay off and some one of the other men would work a double shift for him. [R. 38.]

He got worse and saw Dr. Rayford Hodges, at which time he was still having trouble with his stomach, pain in his right side, was tired and coughing and had a pain in his chest, and in June, 1920, he was operated on for gall bladder after which he returned home and Dr. Hodges treated him for some time. [R. 38.]

In September, 1920, he was employed by the Southern Railroad in Alabama as a switchman where he worked eleven days in September, fifteen days in October, twenty-one days in November, and fifteen days in December. (Pl. Ex. 4.) There was plenty of work he could have done but he felt tired, his stomach hurt and he had pains in the right side and in his chest; that during the days he worked, the other men helped him and during part of those days he was permited to rest, there being no work to do. He left because of his condition. [R. 39.]

He then went to Taft, California, at the suggestion of Dr. Hodges, where he was treated by Dr. Harrison M. Hawkins; while there his stomach bothered him a great

deal, he had a tired feeling, pains in the chest and diarrhoea. He then went to the Veterans' Administration Hospital at Sawtelle where he was told he had tuberculosis and was sent to the tuberculosis hospital. He received vocational training in 1922: he went to school and studied reading, writing and arithmetic, and was then given training in undertaking and embalming for six or eight weeks but was discharged because he couldn't do the light work that was required. [R. 40.]

He returned to Alabama and in 1923 he worked for one month for the Southern Railroad Company, for about one-third of the time; from there he went to the Illinois Central Railroad where his friends helped him a great deal and would allow him to sit down and rest and did much of the work for him; he was too tired and not able to work and would "give out" and was forced to leave that employment after three or four months. [R. 40.]

He then went to a Government Hospital for an operation and then for about two to three months he tried to sell shirts on a commission working two or three hours with rest periods between, and made between $30.00 and $40.00 per month. [R. 40.]

He heard that Honduras was a good climate for tuberculosis and that living was cheap so he went there at the end of 1924 or the first part of 1925 and stayed there for two years, where he was treated by native doctors and an American doctor. During that time he worked for the United Fruit Company at two periods; once for two months and again a year later for three months; the work was light and he was allowed to lay down and rest in the caboose; and although he could have worked full time, because of his condition he didn't work more than two

days a week during those periods. The doctors at Honduras told him to go to a hospital so he returned to New Orleans but there were no beds so he returned to California and entered the hospital at Sawtelle in 1927 where he remained until 1928. [R. 41.]

In January or February, 1928, he was examined by Dr. Marvel Beem, at which time he was having pains in his stomach, sour belches, pains in his side and a tired feeling. The United States Veterans' Administration sent him to the Naval Hospital at San Diego in 1928; when he was discharged he returned to Alabama and in 1929 and was hospitalized in North Carolina. [R. 42.]

Plaintiff testified that his medical records in the Navy were not correct. That on his trip to California in 1927 he worked for six days for the K. C. M. & O. Railroad to get enough money to go to California. [R. 46-47.]

His testimony regarding his condition in 1922 was substantiated by a disinterested witness, Ray DeSpain [R. 31-32] and the crowded condition of the U. S. S. "Roanoke", the poor ventilation, long hours and working conditions generally for the plaintiff were corroborated by John F. Newsbaum. [R. 33-36.]

Dr. Rayford Hodges testified that he had known the plaintiff for thirty-five or thirty-six years and first treated him professionally in June or July, 1920, and off and on during the summer of that year, at which time the plaintiff complained of a cough, bronchial condition, pain in his chest, pain in the liver and gall bladder, and the doctor found him with bronchial rales, chronic hacking cough, pain in the region of the gall bladder with tenderness and gall bladder tumor: he told plaintiff that he believed plain-

tiff had tuberculosis. Dr. Hodges gave his opinion that the plaintiff was totally and permanently disabled at the time he first treated him in 1919. [R. 48.]

Dr. R. R. Bridges testified he first treated plaintiff in the Fall of 1923 and the plaintiff told him he was short of breath, had night sweats, afternoon temperature and inability to work and he made a diagnosis of pulmonary tuberculosis; that the plaintiff was totally and permanently disabled in 1923 when he first saw him and he believed the plaintiff had a lung condition prior to that date but he could not say how far back. [R. 49-51.]

Dr. Marvel Beem testified he examined plaintiff in January, 1928, and made a diagnosis of a disease of the gall bladder, to-wit: empyema, stone in the gall bladder and chronic gall bladder trouble. That severe pains in the stomach and vomiting, frequent pains in the side and diarrhoea and constipation, which are the symptoms plaintiff described he had in 1918, 1919 and 1920, would be related to the gall bladder, and it was significant that after the gall bladder of the plaintiff was removed in 1920, the condition continued with a yellowish color of the skin; such a condition permits bacteria and poison to go through the system and affects the resistance of the body to other diseases, including tuberculosis; that a tubercular condition of the intestines might have been present; that the fact that the records show that plaintiff had a gangrenous appendix in April, 1922, might be related to the gall bladder trouble. [R. 52-56.]

Dr. Harry Cohn testified that he has specialized in diseases of the chest for twenty years, was a tuberculosis specialist employed by the Government and now in private practice, and Director of the Division of Tuberculosis of

Los Angeles City Health Department; he testified that in his opinion the plaintiff was totally and permanently disabled from some time prior to the 1st day of January, 1920; that the presence of the stomach and intestinal disorders made the curability of the tuberculosis unfavorable; that he disagreed with the opinions of the doctors employed by the defendant that the tuberculosis ever had become "arrested" in the case of the plaintiff; that in many cases of advanced tuberculosis the condition is not discovered until after X-rays are made of the chest although the patient may be apparently well; that plaintiff had tuberculosis for several years before it was discovered; that he had some tuberculosis when he was in the Navy and the conditions under which he worked aggravated the same so that he became totally and permanently disabled sometime prior to his discharge. That the fact that the plaintiff was also suffering from stomach disorders which were acute and regarded as symptoms, the tendency would be for the examining physician and the patient himself to concentrate on his abdomen rather than on his chest. That the disease had been spreading throughout both lungs ever since discovery in 1920; that the age of the plaintiff had an effect on the probability of cure. [R. 58-62.]

Dr. Harrison M. Hawkins testified that he examined plaintiff in April or May of 1921 and he had an infection of the bowels and some disturbance of the gall bladder; he was badly fatigued, considerably emaciated and in a great deal of distress and that he was too weak physically to follow any occupation at the time. [R. 62-63.]

ARGUMENT.

I.

THE JUDGMENT OF THE TRIAL COURT MUST BE AFFIRMED IN VIEW OF THE STATE OF THE RECORD.

II.

THERE IS SUBSTANTIAL EVIDENCE WARRANTING A FINDING THAT THE INSURED BECAME PERMANENTLY AND TOTALLY DISABLED WHILE THE INSURANCE WAS IN EFFECT.

Since the appellee urges that there is nothing for this court to consider, upon this appeal, and the judgment should be affirmed, we shall develop his first argument before answering that of the appellant.

I.

The Judgment of the Trial Court Must Be Affirmed in View of the Status of the Record.

A.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE EVIDENCE UPON WHICH THE JUDGMENT OF THE TRIAL COURT IS BASED.

This court in the case of *United States v. Yamoto* (C. C. A. 9), 50 Fed. (2d) 599, at page 600, speaking on this subject says:

> "There being no waiver either in writing or by stipulation in open court as provided by the above section (referring to section 649, Revised Statutes, as amended by the Act of May 20, 1930, 46 Statutes at Large, Part I, page 486) this court's jurisdiction to

review the proceedings of the trial court is limited to the process, pleadings and judgment. . . . This court being without jurisdiction to review the evidence upon which the judgment of the trial court is based, the judgment must be affirmed."

Such has been the repeated ruling of this court:

Graver Corp. v. Hercules Gasoline Co., (C. C. A. 9), 16 F. (2d) 459;

National Surety Co. v. United States (C. C. A. 9), 17 F. (2d) 372;

Kennedy v. United States (C. C. A. 9), 44 F. (2d) 57;

White v. United States (C. C. A. 10), 48 F. (2d) 178 (War Risk Ins. case).

Appellant takes no exception to the sufficiency of the pleadings, nor that the pleadings and the findings of the trial court do not support the judgment.

B.

JURY WAIVER MAY NOT BE CONSIDERED UNLESS INCLUDED IN THE BILL OF EXCEPTIONS.

The waiver of a trial by jury not being a part of the strict record or judgment-roll, it must be included in the Bill of Exceptions to be considered by a reviewing tribunal.

Clements, etc. v. Coppin, etc. (C. C. A. 9), 72 F. (2d) 796;

Beach v. United States (C. C. A. 9), 35 F. (2d) 837;

Reynolds v. United States (C. C. A. 9), 67 F. (2d) 216;

Hence, in view of the status of the record, there is nothing before Your Honors to review.

Palmer v. Aeolian Co., 46 F. (2d) 746 (C. C. A. 8, certiorari denied 51 S. Ct. 560, 283 U. S. 851, 75 L. Ed. 1458);

James-Dickinson Farm Mtg. Co. v. Seimer, 12 F. (2d) 772 (C. C. A. 7, certiorari denied).

C.

THE ONLY ISSUE WAS WHETHER THE PLEADINGS SUPPORT THE JUDGMENT.

If trial by jury has not been waived, "the case is, in effect, submitted to the (trial) judge as an arbitrator, and his findings of fact and rulings of law are conclusive on the parties, if the pleadings support his judgment. The only issue open to (the) appellants, therefore, is whether the pleadings support the judgment."

F. Carrera & Hermano v. Font, 70 F. (2d) 999, at p. 1001 (C. C. A.);

Campbell v. United States, 224 U. S. 99, 105, 32 S. Ct. 398, 56 L. Ed. 684.

D.

APPELLANT MADE A MOTION FOR NON-SUIT AT THE CLOSE OF PLAINTIFF'S CASE, WHICH WAS DENIED; NO EXCEPTION WAS TAKEN [R. 64]. APPELLANT THEN PRESENTED ITS EVIDENCE [R. 65 ET SEQ.], THEREBY WAIVING ANY ERROR TO SUCH RULING.

Modoc Co. Bank v. Ringling (C. C. A. 9), 7 F. (2d) 535, 536;

Maryland Casualty Co. v. Jones (C. C. A. 9), 35 F. (2d) 791, 792;

Washburn v. Douthit (C. C. A. 8), 73 F. (2d) 23 (decided October, 1934).

And as appellant made no motion for judgment at the close of the trial, on the ground of insufficiency of the evidence, the evidence cannot be reviewed by the appellate court.

Feather River Lumber Co. v. United States (C. C. A. 9), 30 F. (2d) 642.

E.

APPELLANT'S OBJECTIONS BELOW TO APPROVAL OF PLAINTIFF'S FINDINGS AND JUDGMENT WERE TOO GENERAL TO PRESENT THE SUFFICIENCY OF THE EVIDENCE, ON APPEAL.

Defendant (below) made a general "objection to the approval of plaintiff's proposed findings . . . and the entry of judgment thereon" [R. 80] but such a general exception is insufficient to present the sufficiency of the evidence to support the special findings.

Edwards v. Robinson (C. C. A. 9), 8 F. (2d) 726;

Southern Pacific Co. v. Johnson (C. C. A. 9), 8 F. (2d) 993;

Babbitt Bros. v. New Home Sewing Mach. Co. (C. C. A. 9), 62 F. (2d) 530 (concurring opinion of Judge Wilbur at p. 536);

Maryland Casualty Co. v. Jones (C. C. A. 9), 35 F. (2d) 791;

Wear v. Imperial Glass Co. (C. C. A.), 224 F. 60, 63;

Mansfield Hardwood Lbr. Co. v. Horton (C. C. A.), 32 F. (2d) 851, 853;

Tramel v. United States (C. C. A.), 56 F. (2d) 142 (a War Risk Ins. case);

Greenway v. United States (C. C. A.), 67 F. (2d) 738 at 739 (a War Risk Ins. case decided November, 1933);

Denver Livestock Co. v. Lee (C. C. A.), 20 F. (2d) 531;

Columbia Pictures Corp. v. Lawton etc. Co. (C. C. A. 8), 73 F. (2d) 18 (decided, October, 1934).

In this case, appellant objected to the findings and conclusions generally, stating no grounds whatsoever [R. 80-81].

In the absence of an exception to the facts found on the ground that the special findings made by the court have no evidence to support them, and separately stating the exceptions to the conclusions of law drawn by the court from the facts found, the appellate court cannot review the decision of the trial court upon the merits.

Macomber v. Goldthwaite (C. C. A. 9), 22 F. (2d) 638, 640;

First National Bank v. Philippine Refg. Corp. (C. C. A. 9), 51 F. (2d) 218, 222;

Maryland Casualty Co. v. Jones (C. C. A. 9), 35 F. (2d) 791;

First Nat. Pictures v. Robison (C. C. A. 9), 72 F. (2d) 37, 39 (decided July, 1934; rehearing denied);

State Life Ins. Co. v. Sullivan (C. C. A. 9), 58 F. (2d) 741, 744.

The purpose of limiting the review only where the question is raised by specific, direct, unambiguous objections, rather than on broad, "shot-gun" or "omnibus"

grounds, is to clearly afford the trial judge an opportunity for revising his ruling.

McDermott v. Severe, 202 U. S. 600, 610, 26 S. Ct. 709, 50 L. Ed. 1162;

U. S. v. United States F. & G. Co., 236 U. S. 512, 529, 35 S. Ct. 298, 303, 59 L. Ed. 696;

Atchinson, T. & S. Ry. Co. v. Nichols (C. C. A. 9), 2 F. (2d) 12, 13.

F.

Appellant's Request for Declaration of Law Came Too Late.

Quoting from *"1934 Cumulative Supplement to Manual of Federal Appellate Procedure"* (2nd Ed.), by Paul P. O'Brien, Esq. (page 6):

> "A request for judgment, or for declaration of law, or for special findings of fact and conclusions of law, made after the case has been submitted, and the trial judge has announced his decision, but before formal judgment has been entered, comes too late and is not made 'during the progress of the trial' as required by Sec. 700 R. S. (28 U. S. C. A. Sec. 875). It is essential that such motion be made at or before the submission of the cause for decision, both in a case submitted upon an agreed statement of all the ultimate facts, as well as in cases tried by the court without a jury." (Citing cases.)

Your Honor's attention is directed particularly to the concurring opinion of Judge Wilbur in the *Babbitt Bros. v. New Home* case [62 F. (2d) 530], wherein he stated (p. 536):

> "Furthermore, the request for findings, even if otherwise sufficient to raise the question sought to be presented here, was made long after the trial was concluded and after the court had announced its decision, and therefore the failure of the court to find the facts in accordance with the findings proposed by the losing party would not be subject to review."

This rule was adopted by this court in the later case of *Continental Nat. Bank v. National City Bank* (C. C. A. 9), 69 F. (2d) 312, 317 (certiorari denied October 8, 1934).

In addition to the cases cited in Mr. O'Brien's admirable Supplement, this court so decided in the earlier case of *Edwards v. Robinson* (C. C. A. 9), 8 F. (2d) 726, at p. 727. In that case, no request for special or general findings was made until after the close of the case and not until 10 days after an adverse decision had been announced by the trial court.

In this appeal an almost identical condition exists [R. 79-81]. In *Edwards v. Robinson, supra,* this court held (page 727):

> "Under the circumstances, we are without jurisdiction to consider the sufficiency of the evidence to support the findings."
>
> *First Nat'l Bk. v. Philippine Refg. Corp.* (C. C. A. 9), 51 F. (2d) 218, at 219.

G.

THE TRIAL COURT WAS WITHOUT POWER TO INCORPORATE IN THE BILL OF EXCEPTIONS SUBMISSION OF THE PROPOSED SPECIAL FINDINGS NUNC PRO TUNC.

Whereas in this case a declaration of law was not requested during the trial and an exception saved, or special findings requested before judgment, the court had no power to incorporate in the bill of exceptions *nunc pro tunc* as of the time an exception should have been taken, one which in fact was not then taken. [R. 80-81.]

First Natl. Bank v. Philippine Refg. Corp. (C. C. A. 9), 51 F. (2d) 218, 222.

This court, in the last above cited case, quoted with approval (p. 222) from *Insurance Co. v. Boon,* 95 U. S. 117, 126, 24 L. Ed. 395:

> " 'We hold now, as we have always holden, that when bills of exceptions are necessary to bring any matters upon the record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. *A judge cannot afterwards allow one not taken in time. Could he allow it, the record would be made to speak falsely.'* (Italics yours.) . . .
>
> "It is clear from the foregoing that the question of the sufficiency of the evidence to justify the judgment cannot be reviewed by this court."

As this court has said, "they come too late if made after judgment, even though the trial judge after judgment, granted leave to make the request."

Continental Nat. Bank v. National City Bank (C. C. A. 9), 69 F. (2d) 312, 317 (and cases cited) (cert. denied Oct. 8, 1934).

H.

WHERE A COURT MAKES GENERAL FINDINGS AND ALSO SPECIAL FINDINGS, FAILURE TO MAKE OTHER OR DIFFERENT SPECIAL FINDINGS CANNOT BE REVIEWED AS ERRONEOUS.

The trial court made a general finding sufficient to support the judgment. [R. 18-20 and 79.] It also made special findings. [R. 21-25.]

Where the court not only makes a general finding, but also makes special findings of fact, the failure to make other or different special findings of fact requested by appellant cannot be reveiwed as erroneous, because the court, having exercised its discretion in favor of making a general finding, is not required to make any special findings whatever, and the mere fact that it does supplement its general findings by certain special findings, cannot require it to make other findings.

Babbitt Bros. Trading Co. v. New Home Mach. Co. (C. C. A. 9), 62 F. (2d) 530, 536 (concurring opinion of Judge Wilbur);

Rev. Stat., Sec. 649 (28 U. S. C. A. 773);

Meath v. Board of Mississippi Levee Comm., 109 U. S. 269, 3 S. Ct. 284, 27 L. Ed. 930;

British Queen Mining Co. v. Baker etc. Co., 139 U. S. 222, 11 S. Ct. 523, 35 L. Ed. 147;

Newlands v. Calaveras M. & M. Co. (C. C. A. 9), 28 F. (2d) 89;

Modoc Co. Bank v. Ringling (C. C. A. 9), 7 F. (2d) 535, 537;

U. S. v. Kelly (C. C. A. 5), 68 F. (2d) 312 (war risk case decided Jan., 1934);

Cross Co. v. Texhoma Oil etc. Co. (C. C. A. 8), 32 F. (2d) 442, 445.

Where the trial court refuses to approve special findings or to make a request for a declaration of law offered by the losing party after the case is tried, submitted and the decision announced (as in this case), the ruling of the trial court will not be disturbed upon appeal.

First Natl. Bank v. Philippine Refg. Corp. (C. C. A. 9), 51 F. (2d) 218, 221;

Denver Live Stock Comm. v. Lee (C. C. A. 8), 18 F. (2d) 11, 14 [rehearing denied 20 F. (2d) 531].

I.

WHERE A GENERAL FINDING IS MADE, REVIEW IS LIMITED TO THE RULINGS OF THE TRIAL COURT IN THE PROGRESS OF THE TRIAL. APPELLANT ASKED FOR NO RULINGS EXCEPT ON ITS MOTION FOR A NONSUIT.

Wulfsohn v. Russo-Asiatic Bank (C. C. A. 9), 11 F. (2d) 715.

J.

AN ALLEGED ERROR OF LAW CANNOT BE REVIEWED IN THE JURY WAIVED CASE.

All evidentiary facts were admitted except one issue of fact: that of permanent and total disability prior to mid-

night of January 30, 1920. [R. 30-31.] The alleged error of law, (if any) made by the court in finding for plaintiff on that one issue of fact, cannot be reveiewd.

Kunihiro v. Lyons Bros. Co. (C. C. A. 9), 12 F. (2d) 894 at 986 (rehearing denied; cert. denied, 47 S. Ct. 112).

K.

TRIAL COURT'S FINDINGS ON QUESTIONS OF FACT ARE CONCLUSIVE ON APPEAL.

> "Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

[Verbatim from *Dooley v. Pease,* 180 U. S. 126, 131, 132, 21 S. Ct. 329, 331, 45 L. Ed. 457, and cited with approval by this court in *Ocean A. & G. Corp. v. Rubin* (C. C. A. 9), 73 F. (2d) 157, 163, decided October, 1934.]

[1]To same effect, that no reversal will lie for errors of fact, in jury-waived case:

Continental Natl. etc. Co. v. Olney Nat. Bank (C. C. A. 7), 33 F. (2d) 437, 438;

Mission Marble Wks. v. Robinson etc. Co. (C. C. A. 9), 20 F. (2d) 14, 15;

Clements v. Coppin (C. C. A. 9), 61 F. (2d) 552, 557;

Porter Co. v. Java etc. Co. (C. C. A. 9), 4 F. (2d) 476, 477 (cert. denied 45 S. Ct. 515, 268 U. S. 697, 69 L. Ed. 1163).

---

1. Rehearing pending.

II.

There Is Substantial Evidence to Support the Findings of Total and Permanent Disability While the Policy Was in Force.

A.

In Answering the Argument of Appellant, We Submit That the Decisions Quoted by Appellant Relating to the Long Delay in Bringing Suit, Add to the Weight of the Evidence on Behalf of Appellant, but That the Weight of the Evidence Is Solely up to the Trial Court.

U. S. v. Higbee (C. C. A. 10), 72 F. (2d) 773, 775.

"It is fundamental that this court must view the evidence in the light most favorable to the appellee, and must affirm the findings and conclusions of the trial court if they are supported by any substantial evidence."

U. S. v. Scarborough (C. C. A. 9), 57 F. (2d) 137;

U. S. v. Pentz (C. C. A. 9), 35 F. (2d) 350;

U. S. v. Todd (C. C. A. 9), 70 F. (2d) 540;

U. S. v. Lesher (C. C. A. 9), 59 F. (2d) 53, 55;

U. S. v. Alger (C. C. A. 9), 68 F. (2d) 592, 593;

U. S. v. Dudley (C. C. A. 9), 64 F. (2d) 743, 744;

U. S. v. Francis (C. C. A. 9), 64 F. (2d) 865.

This court must assume that the trial judge disbelieved witnesses whose testimony conflicted with its findings and judgment and believed those whose testimony supported

them, the court's judgment having the force and effect of a verdict of a jury.

Sec. 649, *R. S.* (28 U. S. C. A. 773);

Ford Motor Co. v. Pearson (C. C. A. 9), 40 F. (2d) 858;

Independence Indem. Co. v. Sanderson (C. C. A. 9), 57 F. (2d) 125;

Larsen v. Portland Calif. S. S. Co. (C. C. A. 9), 66 F. (2d) 326, 329.

B.

IN THE CASE AT BAR THERE WERE EXPERTS WHO STATED THAT IN THEIR OPINION THE PLAINTIFF'S DISABILITY WAS PERMANENT AND TOTAL ON THE DATE AT ISSUE.

Any conflict in opinions of expert witnesses and the weight to be given opinion evidence, are matters for the trial court and will not be reviewed on appeal.

U. S. v. Alger (C. C. A. 9), 68 F. (2d) 592, 593;

U. S. v. Francis (C. C. A. 9), 64 F. (2d) 865, 867;

U. S. v. Burleyson (C. C. A. 9), 64 F. (2d) 868, 872;

U. S. v. Todd (C. C. A. 9), 70 F. (2d) 540, 541;

U. S. v. Dudley (C. C. A. 9), 64 F. (2d) 743.

In the absence of an objection, it must be assumed that a doctor had sufficiently qualified as an expert.

Hardy v. Baker, 10 F. (2d) 277, 280.

Dr. Hodges [R. 48], and Dr. Bridges [R. 50], answered hypothetical questions put to them, but the bill of exceptions does not state the factual foundation included in the hypothetical question.

Consequently, their opinions cannot be assailed upon appeal and if accepted by the trial court, are sufficient in weight and credibility to support the judgment.

U. S. v. Francis (C. C. A. 9), 64 F. (2d) 865, 867.

The fact that a hypothetical question to an expert omitted necessary facts (if true) cannot be considered on appeal, where no objection was made, nor an exception taken and included in the assignment of errors.

U. S. v. Nickle (C. C. A. 8), 70 F. (2d) 873.

C.

THE MATTER OF ANY ALLEGED INCONSISTENCIES IN PLAINTIFF'S TESTIMONY, INCLUDING A STATEMENT OF NO DISABILITY AT DISCHARGE, AND THE WEIGHT TO BE GIVEN SUCH EVIDENCE, IS ENTIRELY WITHIN THE PROVINCE OF THE TRIAL COURT.

U. S. v. Dudley (C. C. A. 9), 64 F. (2d) 743;
U. S. v. Jensen (C. C. A. 9), 66 F. (2d) 19.

D.

PLAINTIFF FOLLOWED VOCATIONAL TRAINING FOR APPROXIMATELY SIX OR EIGHT WEEKS [R. 31] AND HAD TO GIVE UP ON ACCOUNT OF HIS HEALTH. SUCH A RECORD IS NOT CONCLUSIVE SINCE VOCATIONAL TRAINING, LIKE A WORK RECORD, IS FOR THE COURT TO PASS ON.

U. S. v. Jensen (C. C. A. 9), 66 F. (2d) 19.

E.

IN MEASURING THE QUANTUM OF EVIDENCE NECESSARY TO SUSTAIN A JUDGMENT, THE REMEDIAL PURPOSES OF THE WORLD WAR VETERANS ACT SHOULD BE CONSIDERED.

Sorvik v. United States (C. C. A. 9), 52 F. (2d) 406, 410 (and cases cited).

The plaintiff testified that he had only had a fifth grade country school education. [R. 39.] He tried to sell shirts but because of his lack of education and adaptability, and also because of his health, he was not able to make more than $30.00 to $40.00 per month working five or six hours a day and only followed this occupation for two or three months. [R. 40.]

As this court said in *Sorvik v. U. S.* (C. C. A. 9), 52 F. (2d) 406, 410, it is clear that Woodall, because of his educational limitations, was not equipped for office work; it is likewise clear that he made repeated manful efforts to earn his living in firing boilers and as a switchman, which were the only occupations he knew, but he had to give this up after short periods of time at each attempt,

because of the deleterious effect upon his health. Unlike the facts found in *Sorvik v. U. S., supra,* Woodall at all times could have obtained work; every time he did give up work it was not because of the lack of opportunity for employment but because of his physical condition.

Events subsequent to November, 1919, are, of course, vitally important in determining his condition prior to the time that the policy lapsed, for the effect of tubercle bacilli varies widely with the individual infected therewith and it is impossible to make a definite prognosis at the outset of the disease.

> *U. S. v. Thomas* (C. C. A. 10), 64 F. (2d) 245, 246.

The combination of the tuberculosis and the stomach ailments and the working conditions of Woodall bears favorably with those considered by this court in the case of *U. S. v. Meserve* (C. C. A. 9), 44 F. (2d) 549, except that the work record of Mr. Meserve was much more substantial than this plaintiff. While it is true that Mr. Meserve died in 1928, the Government of course makes no claim that a plaintiff must be dead in order to be permanently disabled, and has admitted permanent and total disability since March 20th, 1928. [R. 31.] In other words, the Government admits that Woodall was permanently disabled, and there is substantial evidence in the record to show that he was totally disabled at all times from November, 1919.

Total disability, of course, is not an abstract concept. It is not the same in all circumstances and under all conditions. It is a relative term, and whether it is present

in a particular case depends upon the peculiar facts and circumstances of that case. The problem of determining whether it exists in a given case is concrete and relative, not abstract.

U. S. v. Rasar (C. C. A. 9), 45 F. (2d) 545, 547.

The Government in its brief calls attention to the fact that Dr. Rayford Hodges testified on cross-examination (which is not binding on the plaintiff) that there were occupations which Woodall could have held down fairly well, where not much physical exertion or exposure was required [R. 49], and on direct examination testified that he could not do manual labor continuously [R. 48], but as this court said in *U. S. v. Rasar* (C. C. A. 9), 45 F. (2d) 545, at page 547, he had neither the education or training to qualify him for clerical work and it was not possible for him in his period of life to fit himself for it. His education and fitness was identical to that of Rasar.

Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, is recognized as one of the leading authorities on pulmonary tuberculosis [R. 67, 69] and has been so recognized by the Circuit Court of Appeal for the 10th Circuit [*U. S. v. Thomas*, 64 F. (2d) 245, page 246]. Dr. Fishberg states, as to the matter of arrest or whether a tuberculosis condition is arrested, depends on whether the patient remains in good condition for some time after returning to his old environment, without suffering a relapse of the constitutional symptoms; that improvement counts if it lasts without special treatment.

Fishberg, Pulmonary Tuberculosis, 1932 Edition, Vol. 2, page 247.

As the learned Dr. Fishberg further states (Vol. 2, p. 308):

"It may be said that, with some striking exceptions, if a patient is not able to pursue his former line of work he is altogether disabled.

"The notion that this disease is curable in its incipient stage is one of the medical half-truths which have gained universal credence because of tradition. There are so many exceptions as to almost nullify this ancient *dictum.* We have already shown that it is fallacious to classify phthisis (tuberculosis) into three or four stages, and to say, without reservation, that in the first stage it is curable; in the second stage the chances of recovery are considerably diminished, while in the third stage it is incurable.

"There are incipient cases detected as early as is humanly possible which have no chance, irrespective of the treatment applied; while there are many in the third stages whose chances of survival and even of efficiency are excellent.

"The elements of prognosis in phthisis (tuberculosis) reside in the following factors:

(1) The form of the disease;

(2) In a given form of the disease, the activity of the process as revealed by the constitutional symptoms and physical signs;

(3) The presence of complications;

(4) The extent of the lesion in the lungs;

(5) The economic condition of the patient."

An interesting discussion on tuberculosis will be found in *"Attorneys' Text Book of Medicine"* published in 1934,

by Roscoe N. Gray, M. D., Surgical Director, Aetna Life Insurance Company of Hartford, Conn., from which the following are excerpts:

> "The diagnosis of tuberculosis is difficult, because the disease may involve any part of the body, or many parts at once, leading to a great variety of symptoms. The disease thus simulates various medical and surgical conditions, frequently leading to errors in diagnoses sometimes leading to disastrous results. . . . The finding of tubercle bacillus is conclusive proof that infection is present. . . . Failure to identify the tubercle bacillus does not necessarily mean that tuberculosis is absent, since the organisms will only be liberated into the excretions when there is actual destruction of tubercular foci" (pages 441-442).

Speaking of X-ray studies of the lungs, Dr. Gray states:

> "Their interpretation necessitates the services of an expert. Contrary to popular belief, *it is not easy to determine whether tuberculosis is present or active, even with fairly good pictures of the lungs,* and many doctors overlook the disease, or declare the patient to be so infected when such is not true" (page 443).

Speaking of the symptoms at the inception of a chronic infection of the lungs, Dr. Gray states that the symptoms are usually very slight. In fact, that the majority of such cases are never recognized. The first usual symptoms are those indicative of an inflammation of the bronchi: the patient simply has a neglected cold, or one which is protracted. A tired feeling is frequent, leading to errors in diagnosis. Pain in the lungs may be the first finding and if present is of cardinal importance (page 446). Pain in the chest may be great or absent as symptoms of moder-

ately advanced tuberculosis. Cough is one of the commonest and most troublesome symptoms (page 447).

In the fibroid type of tuberculosis, which is also chronic, there is usually no temperature whatever or night sweats and the loss of weight is relatively slow. The patient complains of a cough and has a shortness of breath upon exertion (page 448).

> "Tuberculosis, the white plague" (says Dr. Gray), "is still one of the major causes of death, in spite of the tremendous sums spent annually in fighting this dread disease" (page 429).

In speaking of predisposing causes of the disease, Dr. Gray mentions that dust, confining work, long or irregular hours, are all factors leading to poor hygiene. That almost any diseased condition lowers the general vitality of the patient. This makes infection with the tubercle bacilli easy, and materially increases the likelihood of a dormant infection becoming active (page 435).

We see at once there is no hard fast rule with this disease; that stress and strain permit the dormant tubercle bacilli to spread and become active; that when complicated with diseases of the intestines and stomach and other complications, the prognosis is more doubtful; and that the determination of the onset of the disease and its totality must be viewed with the experience of the patient in attempting to follow his usual occupation with reasonable regularity.

And, lastly, that at least in the absence of such a work record as to conclusively negative such a finding, the question of total and permanent disability in tuberculosis cases

must necessarily be a matter of expert opinion, and within the sound discretion of the trial court.

Each of these cases must stand upon the particular facts in that case.

U. S. v. Rasar (C. C. A. 9), 45 F. (2d) 545.

It is submitted that there is sufficient evidence to support the findings and judgment:

U. S. v. Monger (C. C. A. 10), 70 F. (2d) 361;

U. S. v. Kane (C. C. A. 9), 70 F. (2d) 396;

U. S. v. Todd (C. C. A. 9), 70 F. (2d) 540;

U. S. v. Suomy (C. C. A. 9), 70 F. (2d) 542;

U. S. v. Anderson (C. C. A. 9), 70 F. (2d) 537;

U. S. v. Thomson (C. C. A. 10), 71 F. (2d) 860;

U. S. v. Bartlett (C. C. A. 9, No. 7408) (not reported yet);

U. S. v. Brown (C. C. A. 10), 72 F. (2d) 608;

U. S. v. Higbee (C. C. A. 10), 72 F. (2d) 773.

Conclusion.

It is therefore respectfully submitted that in view of the evidence in favor of the plaintiff, and further in view of the state of the record, the judgment should be affirmed.

VOLNEY P. MOONEY, JR.,
SYLVESTER HOFFMANN,
Attorneys for Appellee.